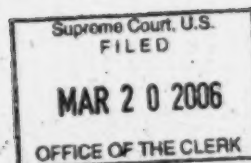


(5)



No. 05-777

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN
SERVICES FINANCE AND SUPPORT, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT*

REPLY BRIEF FOR THE PETITIONER

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1. The court of appeals held that Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 to 12165, is not a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, as applied in the context of institutionalization. Pet. App. 5a-6a. As explained in the government's petition for a writ of certiorari, Pet. 6-10, that ruling reflected a fundamental disregard of this Court's prior decision in *Tennessee v. Lane*, 541 U.S. 509 (2004), with respect to both the constitutional decisions rendered in that case and the principle of constitutional avoidance that it applied. Pet. 6-10. Given the gravity of the court of appeals' holding that an Act of Congress is unconstitutional and the court's failure to adhere to precedent and long-established principles of constitutional avoidance, the peti-

tion explained that the case warrants this Court's review—whether plenary or, at a minimum, a decision to grant, vacate, and remand in light of *Lane*. Pet. 10. However, in light of the pendency at that time of *United States v. Georgia*, No. 04-1203, and *Goodman v. Georgia*, No. 04-1236, which presented the question of Congress's power to apply Title II to the administration of prison systems, the United States suggested that the present petition be held pending this Court's decision in those cases. Pet. 10-11.

On January 10, 2006, this Court issued its decision in *United States v. Georgia* and *Goodman v. Georgia*. See *United States v. Georgia*, 126 S. Ct. 877. In *Georgia*, the Court unanimously reaffirmed its context-specific approach to the analysis of Title II's constitutionality, upholding the law as a proper exercise of Congress's Section 5 power to the extent that it "creat[es] private remedies against the States for *actual* violations" of the rights protected by Section 1 of the Fourteenth Amendment. *Id.* at 881; see *id.* at 882 ("[I]nsofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity."). The Court further held that, to the extent that Title II is used directly to enforce rights protected by Section 1 of the Fourteenth Amendment, "the lower courts will be best situated to determine in the first instance, on a claim-by-claim basis," which rights are at issue in a given case. *Id.* at 882.

2. The Court's recent decision in *Georgia* magnifies the constitutional errors in the court of appeals' decision that were identified in the government's petition for a writ of certiorari and, in particular, the court of appeals' disregard for the constitutional framework established

by *Lane*—and reconfirmed by *Georgia*—and the predicate holdings that underlie *Lane*'s judgment.

The court of appeals held that its prior decision in *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), cert. dismissed, 529 U.S. 1001 (2000), compelled the conclusion that Title II is unconstitutional in all of its applications save the class of cases implicating access to the courts addressed in *Lane*, and that no more particularized inquiry needed to be undertaken into the constitutionality of Title II. Pet. App. 6a. But *Alsbrook* was decided on the basis that Title II only enforces the Fourteenth Amendment's Equal Protection Clause. 184 F.3d at 1008-1009. Both *Georgia* and *Lane* held that, in analyzing Congress's exercise of its Section 5 power, courts must take account of the fact that Title II enforces multiple constitutional rights. See *Georgia*, 126 S. Ct. at 880-881 (Title II enforces the Eighth Amendment); *Lane*, 541 U.S. at 522-523 (listing the numerous constitutional rights enforced by Title II).

In addition, the court of appeals here held that—after *Lane*—its sweeping invalidation of Title II in *Alsbrook* “ha[d] been modified” only with respect to Title II’s “discrete application * * * to claims of denial of access to the courts.” Pet. App. 6a. *Georgia* makes clear, however, that *Alsbrook* was also wrong, at a minimum, with respect to some claims arising in the context of institutionalization—those claims that seek to remedy actual constitutional violations. 126 S. Ct. at 881-882. While respondent insists that this case does not implicate any fundamental constitutional rights, the private respondents supporting the petition expressly disagree. Private Resp. Supp. Br. 3. As this Court recognized in *Georgia*, 126 S. Ct. at 882, resolution of that question is best addressed by the lower court in the first instance,

within the framework of this Court's decisions in *Georgia* and *Lane*.

Furthermore, the Court in *Georgia* unanimously directed that, with respect to Title II's prophylactic enforcement of constitutional rights, courts must address Title II's constitutionality based on the particular "class of conduct" at issue, whether the question arises in the institutionalization context or elsewhere. 126 S. Ct. at 882. The court of appeals' wholesale invalidation of all of Title II except for access-to-the-courts cases cannot be reconciled with *Georgia*'s directive, or with *Lane*.

The Eighth Circuit's departure from precedent does not stop there. In the *Alsbrook* decision on which the court relied here, the Eighth Circuit held that Congress lacked a sufficient record of discrimination to enact Title II. 184 F.3d at 1009. In *Lane*, however, this Court expressly held that Congress passed Title II in response to an "extensive record of disability discrimination," 541 U.S. at 529, and "of pervasive unequal treatment [of individuals with disabilities] in the administration of state services and programs, including systematic deprivations of fundamental rights," *id.* at 524. Of particular relevance here, *Lane* found that the record of "unconstitutional treatment of disabled persons by state agencies" included "unjustified commitment," and other abuses in the "state mental health" system. *Id.* at 524-525. This Court further noted the specific congressional finding that unconstitutional treatment "persists" in such areas as "institutionalization." *Id.* at 529 (quoting 42 U.S.C. 12101(a)(3)). The Court accordingly held in *Lane* that it is "clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation" under Congress's Section 5 power. *Id.* at

529. *Alsbrook's* holding—reaffirmed by the court of appeals in this case, Pet. App. 6a—that Congress lacked a basis for exercising its Section 5 power to enact Title II is irreconcilable with that key underpinning of *Lane*.

Finally, respondent Nebraska Department of Health and Human Services Finance and Support makes no effort to defend the court of appeals' violation of established principles of constitutional avoidance, which are at their apex when the Court addresses the constitutionality of an Act of Congress. See Pet. 9-10; cf. *Ayotte v. Planned Parenthood*, 126 S. Ct. 961, 967-968 (2006) (courts should address and remedy statutory violations of the Constitution on the narrowest ground possible). *Georgia's* carefully measured and narrow approach to the constitutionality of Title II reconfirms what *Lane* already made plain: the Eleventh Amendment is no exception to that rule. See *Georgia*, 126 S. Ct. at 881-882; *Lane*, 541 U.S. at 530-531 & n.19; see also *Board of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 n.1 (2001).

3. Accordingly, the court of appeals' decision conflicts with this Court's decisions in *Georgia* and *Lane* on multiple grounds. The necessity for this Court's review is underscored, moreover, by a recent decision of the Eighth Circuit. In *Klingler v. Director, Missouri Department of Revenue*, 366 F.3d 614 (2004), the Eighth Circuit dismissed on Eleventh Amendment grounds a Title II claim that implicated the right to travel and equal access to governmental services and programs. There, as here, the court of appeals held that Title II as a whole was invalid based on *Alsbrook*. See *id.* at 616-617. This Court subsequently vacated that judgment and remanded for reconsideration of the decision in light of *Lane*. See *Klingler v. Director, Mo. Dep't of Revenue*,

125 S. Ct. 2899 (2005). However, just days after this Court's decision in *Georgia*, the Eighth Circuit declined to reconsider its decision in *Klingler*, notwithstanding this Court's remand for precisely that purpose, because of the court of appeals' decision in this case. See *Klingler v. Director, Mo. Dep't of Revenue*, 433 F.3d 1078, 1082 (Jan. 17, 2006). Vacatur of the court's decision in this case thus is necessary to allow the Eighth Circuit the opportunity to bring its caselaw into line with this Court's decisions in both *Georgia* and *Lane*.

Because the court of appeals' decision in this case is wrong for reasons that have already been resolved in *Lane* and that were just recently reaffirmed in *Georgia*, the appropriate course at this juncture is to grant the petition for a writ of certiorari, vacate the judgment below, and remand for reconsideration of the court of appeals' sweeping invalidation of Title II in a manner that is consistent with and adheres to the framework for constitutional analysis established by this Court's decision in *Lane* and reaffirmed in *Georgia*.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted, the court of appeals' judgment vacated, and the case remanded for further consideration consistent with this Court's decisions in *United States v. Georgia*, 126 S. Ct. 877 (2006), and *Tennessee v. Lane*, 541 U.S. 509 (2004).

Respectfully submitted,

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